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ATTORNEYS FOR  
West Coast Fence, Inc.

UNITED STATES BANKRUPTCY COURT  
EASTERN NORTHERN DISTRICT OF CALIFORNIA  
(Modesto Division)

In re:	)	Case No. 10-47419-A-7
WEST COAST FENCE CO., INC.,	)	CHAPTER 7
	)	Date: November 15, 2010
Debtors.	)	Time: 9:00 a.m.
	)	Location: U.S. Bankruptcy Court
	)	1200 I St., 7 <sup>th</sup> Floor
	)	Sacramento, CA
	)	Courtroom: 28
	)	Judge: Hon. Michael McManus

**MOTION FOR RELIEF FROM THE AUTOMATIC STAY  
AND FOR ORDER DIRECTING THE DEBTOR TO SURRENDER REAL  
PROPERTY**

COMES NOW, West Coast Fence, Inc. ("WCF" or "Landlord") and submits the following motion for an order granting Landlord relief from the automatic stay to secure and recover exclusive possession of the non-residential commercial property located at 2786 Aiello Dr., San Jose, CA 95111( the "Real Property") from the Debtor and all others, asserting a right of possession to the Real Property; to prosecute the pre-petition unlawful detainer action entitled West Coast Fence, Inc. v. South Y Fireplace, Inc., dba West Coast

1 Fence, Santa Clara County Superior Court Action # 1-10-CV-184542 (“UD Action”); to  
2 permit Landlord to accept Debtor’s and the Chapter 7 Trustee’s surrender of the Real  
3 Property; and to exercise its rights pursuant to California Civil Code Section 1980, et seq  
4 and California law relative thereto (“Motion”) as follows:

5 **I. Introduction and Summary.**

6 Landlord seeks a surrender and exclusive possession of the Real Property from the  
7 Debtor, the Chapter 7 Trustee, and all others because Debtor and the Trustee are not paying  
8 rent, have not provided proof of insurance, and are not conducting business at the Real  
9 Property, are interfering with Landlord’s right to occupy and possess the Real Property, and  
10 have not executed a related stipulation. The Landlord’s inability to secure a surrender and  
11 exclusive possession of the Real Property causes immediate and potentially long term harm.

12 **II. Factual Background.**

13 Debtor is actually South Y Fireplace, Inc. and is not West Coast Fence Co., Inc. (See  
14 Statement of Financial Affairs, Section 18).

15 Debtor leased the Real Property from Landlord pursuant to a California Commercial  
16 Lease Agreement dated September 24, 2008 (“Lease”). (See Schedule G)(Landlord will  
17 provide the court, the Chapter 7 Trustee, and Debtor with a copy of the Lease upon request.  
18 The Lease called for, inter alia, Debtor’s monthly lease payments of \$6,000, Debtor’s  
19 payment of various utilities, and for Debtor to secure insurance. The Lease expired on  
20 September 30, 2009.

21 Prior to October 8, 2010 Debtor, inter alia, Debtor was significantly in arrears on  
22 lease payments and owed Landlord approximately \$54,000.00 in pre-petition lease  
23 payments. (See Schedule F)

24 On October 8, 2010 Landlord commenced an unlawful detainer action against Debtor  
25 seeking, inter alia, to secure and recover exclusive possession of the Property from the  
26 Debtor and all others, entitled West Coast Fence, Inc. v. South Y Fireplace, Inc., dba West  
27 Coast Fence, Santa Clara County Superior Court Action # 1-10-CV-184542 (“UD Action”)

1 (See Schedule F and Statement of Financial Affairs Section 4).

2 On October 14, 2010, Debtor commenced this bankruptcy.

3 **III. The Court Should Grant Relief From Stay And Order The Surrender of The Real**  
4 **Property To Landlord So Landlord May Recover Exclusive Possession Of The Real**  
5 **Property Without Further Delay Or Expense.**

6 **A. Landlord Is Entitled To Relief From Stay Pursuant to Section 362 (d)(1) and (2)**  
7 **And Because The Lease Terminated Pre-Petition.**

8 Relief from stay is warranted pursuant to 11 U.S.C. 362, including sections 362 (d),  
9 including sections 362 (d) (1) and (2) and because Debtor and the Trustee are not paying  
10 rent, have not provided proof of insurance, and are not conducting business at the Real  
11 Property and as such are interfering with Landlord's right to occupy and possess the Real  
12 Property.

13 In addition, as the Lease terminated pre-petition the stay should not apply to  
14 Landlord. (See Section 362 (b)(10) and *In re Windmill Farms*, 841 F.2d 1467 (9<sup>th</sup> Cir. 1988);  
15 *In re Acorn Investments, Inc.*, B.R. 506, 510 (S.D. Cal. 1981); and *In re Elm Inn, Inc.*, 942  
16 F.2d 630 (9<sup>th</sup> Cir. 1991).

17 **B. The Debtor Has Ignored Landlord's Proposed Stipulation.**

18 On Friday, October 15, 2010 and Monday, October 18, 2010 Landlord's counsel left  
19 voice mail messages with Debtor's counsel and the Trustee indicating, inter alia, that  
20 Landlord wished to pursue surrender and possession of the Real Property by stipulation  
21 rather than by formal motion and on Monday, October 18, 2010, emailed a proposed  
22 stipulation to Debtor's counsel and the Trustee.

23 Debtor's counsel has ignored all communications.

24 **C. The Trustee Has Not Executed The Landlord's Proposed Stipulation.**

25 During the week of October 18, 2010, the Trustee responded and indicated that he  
26 intended to visit the Real Property during the week of October 25, 2010 before responding to  
27

1 the proposed stipulation.

2 **IV. Landlord Does Not Waive Its Right To Submit An Administrative Claim, Its**  
3 **Independent Rights As A Secured Creditor, Or To Assert An Objection To The**  
4 **Jurisdiction Of This Court Or To Assert Damages For The Continued Misuse of**  
5 **Landlord's Name.**

6 By way of this motion Landlord does not waive its right to submit an administrative  
7 claim.

8 In addition, by way of this motion Landlord, which is also a party to a secured  
9 promissory note with Debtor, does not waive its rights relative to the promissory note or  
10 related collateral.

11 In addition, by way of this motion Landlord does not waive its right to assert an  
12 objection to the jurisdiction of this court based on the potential mis-filing of this matter in  
13 the Eastern District as opposed to the Northern District where the Debtor operated, had its  
14 principal place of business, and had its assets.

15 Lastly, by way of this motion Landlord does not waive its right to assert damage  
16 claim for the continued misuse of Landlord's name as a debtor-something that was brought  
17 to the attention of the Debtor's counsel and the Trustee as early as October 15, 2010.

18 **V. Conclusion.**

19 The court should order Debtor and the Trustee to surrender the Real Property and  
20 grant the Motion.

21 Dated: October 29, 2010

CAMPEAU GOODSSELL SMITH  
/s/ William J. Healy  
William J. Healy  
Attorneys For West Coast Fence, Inc.